In the
Supreme Court of the United States

October Term, 1979

No. 79-270

Charles Gene Heads,

Appellant,

v.

State of Louisiana,

Appellee.

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

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August, 1979

I N D E X

C I T A T I O N S

CASES:

C I T A T I O N S
(continued)

STATUTES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. _____

CHARLES GENE HEADS, Appellant,

v.

STATE OF LOUISIANA, Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

Charles Gene Heads, the appellant, appeals from the final judgment of the Supreme Court of the State of Louisiana, rehearing denied May 21, 1979, affirming his conviction of first degree murder and his sentence to life imprisonment

without benefit of probation, parole, or suspension of sentence.

OPINION BELOW

The opinion of the Supreme Court of Louisiana in proceeding number 63,311 on the docket of its court, dated April 10, 1979, affirming appellant's conviction and sentence appears in the appendix hereto, p. 1a, infra. It is the only opinion below. It will shortly be reported at ____ So.2d ____ (La. 1979).

JURISDICTION

The judgment of the Louisiana Supreme Court appealed from became final upon that Court's denial of a Motion for Rehearing May 21, 1979. See p. 14a, infra. Notice of Appeal to this Court was filed in the Supreme Court of Louisiana July 23, 1979. See p. 15a, infra.

This appeal is docketed in this Court within ninety (90) days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

QUESTIONS PRESENTED

(1) Whether, in a case in which intent is an element of the crime charged, the jury instructions, "a man is presumed to intend the natural and probable consequences of his acts" and "although intent is a question of fact, it need not be proved as a fact", violate the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt as construed by this Court in Sandstrom v. Montana, ____ US _____, 99 S. Ct. 2450 (1979).

(2) Whether the requirement of the Due Process Clause as construed by this Court in Mullaney v. Wilbur, 421 US 684 (1975) that the prosecution prove beyond a reasonable doubt the absence of heat of passion on sudden provocation in a homicide prosecution where that issue is properly presented is violated by a state criminal procedure which:

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(a) Allows the defendant to argue the Mullaney proposition to the jury but refuses to require that the jury be instructed that it is the law.

(b) Neither shifts to the defendant nor clearly places upon the prosecution the burden of proving beyond a reasonable doubt those facts (the presence or absence of heat of passion upon sudden provocation)

which distinguished the greater offense of first degree murder from the lesser included offense of manslaughter, and

(c) Approves the general charge to the jury that "the burden is upon the State to prove every essential element of the crime charged" and not to prove "such facts which may be connected with the crime charged but which are not essential elements thereof" where the jury is not instructed as to what the "essential elements" are as distinguished from "facts connected with the crime" and is left free to guess, choose, and decide the case before it on the basis of extraneous considerations.

CONSTITUTIONAL PROVISION AND STATUTE

This case arises under the Due Process Clause of the Fourteenth Amendment. Relevant Louisiana Statutes are set forth in Appendix D, p. 17a, infra.

RAISING THE FEDERAL QUESTION

The first question presented, the Sandstrom issue, was first raised at the trial court level by timely objection to the offensive portion of the general charge on constitutional grounds citing Mullaney and then again on appeal to the Louisiana Supreme Court in Argument Number IV, Assignment of Error Number 20 (pp. 6a-8a, infra), and Assignment of Error 19, Footnote 2 (p. 12a, infra).

The second federal question here presented, the Mullaney question, was first raised during voir dire, then

again at the trial court level by timely objection to the refusal to give six written requested special charges, and finally on appeal to the Louisiana Supreme Court by Argument Number II, Assignments of Error Nos. 6, 13, 14 and 15, Appendix A, pp. 5a-6a, infra.

The Louisiana Supreme Court has considered and expressly rejected or ignored defendant's federal constitutional claims here presented.

STATEMENT OF THE CASE

In the heat of passion late one Saturday night in Shreveport, Louisiana Charles Heads shot and killed his brother-in-law at his brother-in-law's home where Heads had correctly guessed that his estranged wife had secreted herself and the small children of her marriage to Heads. Several days before, she had suddenly left Heads and their family home

in Houston, Texas without leaving any information as to where she might be found. During the succeeding days Heads desperately searched for her, making many long distance telephone calls and traveling many miles seeking to see his children and a chance to reconcile with his wife. When he arrived at his brother-in-law's home he knocked repeatedly upon the locked door but was met only with silence. Something came over him, he kicked the door open, entered, and found his brother-in-law standing in the hall armed with a pistol. His brother-in-law threatened to kill him if he did not leave. A shoot-out ensued between the two in the house during the course of which Heads emptied his .22 pistol in the direction of his brother-in-law and the brother-in-law fired a shot gun at close range at Heads. Neither of the combatants was struck by any of the many

projectiles fired. His pistol empty, the enraged Heads, a Vietnam combat veteran, ran out to his car, got an automatic .22 rifle, re-entered the house, and resumed firing. One of the shots from the rifle hit and killed his brother-in-law. Heads considered his brother-in-law his friend.

Defense testimony was limited to evidence of reputation and good character, psychiatric testimony, and the testimony of the defendant himself. He admitted firing the fatal shot; the only question was his state of mind.

All three of his defenses were based upon his state of mind, namely: (1) he did not specifically intend and actively desire to kill or cause great bodily harm to his brother-in-law and friend, and therefore, the killing was not murder, (2) if it be found that he did have this specific intent, a common

element of both murder and manslaughter, the killing was committed in heat of passion on sudden provocation and was therefore manslaughter rather than murder, and (3) he was exempt from any criminal responsibility by reason of temporary insanity.

These defenses were keyed to the essential elements of the relevant Louisiana homicide statues, R.S. 14:29-14:32 (pp. 17a-19a, infra). R.S. 14:29 establishes the generic offense of homicide and divides it into four grades, among which are included first degree murder (R.S. 14:30) and manslaughter (R.S. 14:31). First degree murder and manslaughter share the common element of specific intent, which is defined by R.S. 14:10 (p. 17a, infra) as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal

consequences to follow his act or failure to act." (emphasis added) First degree murder and manslaughter, where specific intent is present, are distinguished only by the presence or absence of "sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection." R.S. 14:31 (1) (pp., 18a-19a, infra).

The Louisiana statutory scheme is therefore like the Maine scheme passed upon in Mullaney v. Wilbur, supra, at 691, under which "murder and manslaughter are punishment categories of the single offense of felonious homicide" distinguished only by the presence or absence of "heat of passion on sudden provocation" as determined by an "objective rather than a subjective, behavioral criterion", id. at 702. The Louisiana scheme is totally unlike the affirmative defense

of extreme emotional disturbance as defined by New York law construed in Patterson v. New York, ____ U S ____, 97 S.Ct. 2319 (1977).

Because of a number of highly prejudicial extraneous considerations injected into the trial, it was crucially important that the defendant at his trial have the benefit of unambiguous instructions, clearly informing the jury of the essential elements and facts constituting the crime charged which must be proved beyond a reasonable doubt by the prosecution. Accordingly, the defense requested six special charges on burden of proof, all of which were rejected. The first three special charges are at issue and were the following:

"DEFENDANT'S REQUESTED SPECIAL CHARGE NUMBER 1

The State must prove beyond a reasonable doubt all essential elements of the crime charged. The essential elements of the

offense of first degree murder are:

1. That the defendant killed the deceased;
2. That the defendant had specific intent to kill or cause great bodily harm; and
3. That the defendant did not commit manslaughter."

"DEFENDANT'S REQUESTED SPECIAL ALTERNATE CHARGE NUMBER 1

The State must prove beyond a reasonable doubt all facts constituting the crime charged. The facts constituting the offense of first degree murder are:

1. That the defendant killed the deceased;

2. That the defendant had a specific intent to kill or cause great bodily harm; and

3. That the defendant did not commit manslaughter."

"DEFENDANT'S REQUESTED SPECIAL CHARGE NUMBER 2

You cannot return a verdict of guilty of first degree murder or second degree murder unless the State has borne its burden of proving beyond a reasonable doubt that manslaughter was not committed.

Instead, the Court charged the jury

in the unexplained language of the statutes, R.S. 14:29-31, pp. 17a-19a, infra. The trial court did not tell the jury what the essential elements were. The only instruction touching upon this point was the following confusing and constitutionally inadequate substitute for the requested special charges:

> "The burden is upon the state to prove every essential element of the crime charged. However, this does not mean that the state must prove beyond a reasonable doubt such facts which may be connected with the crime charged but which are not essential elements thereof." (emphasis added)

The jury was therefore at liberty to decide as it chose whether the absence of "sudden passion or heat of blood immediately caused by provocation" was an essential element of the crime of murder which the state must prove or merely a fact which may be connected with the crime charged but which is not an

essential element thereof.

Over defense objection the trial court instructed the jury that "a man is presumed to intend the natural and probable consequences of his acts" and further that "intent need not be proved as a fact", opinion below p. 7a and 12a, infra.

The stage was therefore set for the jury to decide the case on the basis of extraneous considerations, two of which are discussed in the opinion below, p. 2a et seq. and 9a et seq. The first extraneous consideration was intentionally injected by the prosecutor in closing argument when he analogized the defendant to Samuel Berkowitz, the Son of Sam Killer, who was also a post office worker like the defendant. The second extraneous consideration was the emotional outburst of one of the victim's young children during closing argument

who, in the presence of the jury, burst out in tears crying, "Oh my Daddy! Oh my Daddy!" and had to be escorted from the courtroom.

THE QUESTIONS ARE SUBSTANTIAL

Both federal questions raised are substantial. We discuss the substantiality of each separately below.

I.

The first substantial federal question presented is virtually identical to that presented in Sandstrom v. Montana, ____ U S ____, 99 S.Ct. 2450 (1979), namely:

> "The question presented is whether, in a case in which intent is an element of the crime charged, the jury instruction 'the law presumes that a person intends the ordinary consequences of his voluntary acts' violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a

> reasonable doubt." 99 S.Ct. at 2453.

Only minor differences in phraseology distinguish the objectionable instruction in Sandstrom from the objectionable instruction given in appellant's case: "A man is presumed to intend the natural and probable consequences of his acts." See opinion below, p. 7a, infra. The vice is the same.

Sandstrom was decided June 18, 1979, after the Louisiana Supreme Court decided appellant's case April 10, 1979, rehearing denied May 21, 1979. The question then becomes whether or not Sandstrom should be applied retroactively.

The rule of Sandstrom should be applied retroactively for the same reason that the rule of Mullaney was applied retroactively by this Court in Hankerson v. North Carolina, ____ U S ____, 97 S.Ct. 2339 (1977), namely because the objec-

tionable instruction substantially impairs the truth-finding function of the jury and raises serious questions about the accuracy of jury verdicts in past trials. The Sandstrom rule like the Mullaney rule was designed to diminish the probability that an innocent person would be convicted.

II

The second substantial federal question arises out of the efforts of the Louisiana Supreme Court in its opinion below (pp. 5a-6a, infra) to ignore the clear statement of this Court in In re Winship, 397 U S 358 (1970):

> "Lest there remain any doubt about the constitutional statute of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to con-

> stitute the crime with which he is charged." 397 U S, at 364, 90 S.Ct. at 1073 (emphasis added). Quoted with approval and emphasis in Sandstrom v. Montana, ___ U S ___ at ___, 99 S.Ct., at 2457 (1979).

The court below further attempts to avoid the holding of Mullaney v. Wilbur, 421 U S 684 (1975) by limiting it to prohibiting a shifting of the burden of proof to the defendant.

The constitutional rights of the accused recognized in Winship and Mullaney are not mere technicalities but rather go to the very heart of the truth-finding process on the question of guilt or innocence and public confidence in it. Hankerson v. North Carolina, ___ U S ___, 97 S.Ct. 2339 (1977). A state court ought not to be allowed to construe such substantive rights of the accused narrowly, begrudgingly, and in a technical way as if construing the law

of search and seizure.

Appellant's jury was never instructed what the essential elements of the crime of first degree murder were. Due process requires a clear statement of the essential elements to be proved by the state. In the absence of such a statement, the jury was left free to guess as its passions guided it, thereby creating "a genuine danger that the jury would convict petitioner on the basis of ...extraneous considerations rather than on the evidence introduced at trial." Taylor v. Kentucky, ___ U S ___, 98 S.Ct. 1970, 1936 (1978).

Had one or more of appellant's requested special charges been given (pp. 13-14, supra) no juror passing judgment upon appellant could have reasonably entertained any doubt that the negation by the state of manslaughter

(proof beyond a reasonable doubt of the absence of "sudden passion or heat of blood immediately caused by provocation") was an essential element of and fact necessary to constitute the crime of first degree murder.

IIA

The opinion below suggests (p. 5a, infra) that any prejudice which may have resulted to appellant from the refusal to give the requested instructions was cured by allowing appellant to argue to the jury in his closing argument that the rejected instructions were a proper statement of the law. This suggestion has been carefully considered and soundly rejected in Taylor v. Kentucky, ____ U S ____, 98 S.Ct. 1930 (1978) wherein this Court held:

> "But arguments of counsel cannot substitute for instructions by the court. United States

> v. Nelson, 498 F.2d 1247 (C.A. 5 1974). Petitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate for that proposition than the prosecutor will be in implying that extraneous circumstances may be considered. It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." 98 S.Ct., at 1973.

IIB

The opinion below limits the holding of this Court in Mullaney v. Wilbur, 421 U S 684 (1975) merely to prohibiting shifting the burden of proving passion to the defendant. The court below then finds that such a narrow reading of Mullaney is not offended by state law interpreted to neither shift to the defendant nor clearly place upon the prosecution the burden of proving those facts which distinguish the

greater offense of first degree murder from the lesser offense of manslaughter. Under this curious interpretation, "passion may be inferred by the jury", State v. Peterson, 290 So. 2d 307, 311 (La. 1974) without prosecution or defense bearing the burden of proving its presence or absence. The court below erroneously reasons that Mullaney is satisfied as long as there is no affirmative shifting of the burden to the defendant.

State law so construed violates the requirement of Winship that the prosecution bear the burden of proving beyond a reasonable doubt every fact necessary to constitute guilt. There is no constitutional middle ground upon which the prosecution can be relieved of its burden through a jury "inference". The holding of Mullaney is unmistakably clear on this point:

> "We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion or sudden provocation when the issue is properly presented in a homicide case." 421 U S, at 704, 95 S.Ct., at 1892 (emphasis added).

IIC

Appellant's jury was never instructed as to what the essential elements of the offense of first degree murder were. They were never instructed that the absence of passion such as would reduce the homicide to manslaughter was an essential element of the offense of first degree murder. The jury was left free to make this determination on the basis of the language of the statutes involved (p. 17a-19a, infra) and the argument of counsel.

The requirement of Winship and its progeny has little meaning to a jury, like the one below, which was not told

what the essential elements were. Such a jury cannot be reasonably expected to hold the state to its burden of proving each essential element if the court does not instruct the jury what the essential elements are.

The constitutional error was compounded by the instruction actually given, inadequately characterized as follows in the opinion below:

> "The trial judge carefully instructed the jurors that the state had the burden to prove each essential element of the crime charged and that the presumption of innocence relieved the defendant from the necessity of any proof whatever." (p. 6a, infra).

The "careful instruction" to which the opinion below has reference in fact consisted of the following confusing abstract statement which was not related in any way to the elements or facts necessary to constitute guilt of the

offense of first degree murder:

> "The burden is upon the state to prove every essential [element] of the crime charged. However this does not mean that the state must prove beyond a reasonable doubt such facts which may be connected with the crime charged but which are not essential elements thereof." (Emphasis Added) (Transcript below, p. 1985).

Whether the jury which decided appellant's case considered the presence or absence of "sudden passion or heat of blood immediately caused by provocation" an essential element (which the state must prove beyond a reasonable doubt) or a "fact which may be connected with the crime charged" (which the state need not prove beyond a reasonable doubt) will never be known. They were never so instructed.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WELLBORN JACK, JR.
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Shreveport, La. 71101

Counsel for Appellant

August 17, 1979

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served, that three copies of this Jurisdictional Statement have this date been mailed to Mr. B. Woodrow Nesbitt, Jr., Assistant District Attorney, Caddo Parish Courthouse, Shreveport, Louisiana 71101, and that I am a member of the Bar of this Court representing the party in behalf of whom such service has been effected.

Shreveport, Louisiana, this 18 day of August, 1979.

Wellborn Jack, Jr.

APPENDIX A
OPINION OF COURT BELOW
SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 63,311

CHARLES GENE HEADS

DECIDED APRIL 10, 1979
REHEARING DENIED MAY 21, 1979
TO BE PUBLISHED IN ___ So.2d ___ (La. 1979)

CALOGERO, Justice

Defendant, Charles Gene Heads was charged by grand jury indictment with first degree murder. Upon trial by jury, he was found guilty as charged. After a sentencing hearing, the jury recommended life imprisonment without benefit of probation, parole, or suspension of sentence. That sentence was subsequently imposed by the trial court. Defendant has appealed his conviction and sentence relying on twenty-three assignments of error which are presented in fourteen arguments.

Defendant, a resident of Houston, Texas, traveled to Shreveport in search of his wife and children who had left their home in Houston to stay with the wife's sister in Shreveport. After unsuccessfully attempting to communicate with his wife by telephone, defendant went to his sister-in-law's home. When he was refused entrance, he kicked open a carport door, entered, and found his sister-in-law's husband, the victim, in the hall armed with a pistol. After

being ordered to leave the premises, the defendant opened fire with a .22 caliber pistol. When that gun was empty, he went out to his car, obtained an automatic rifle, re-entered the house, and resumed firing. One of the shots from the rifle hit the victim, killing him.

ARGUMENT NO. 1
ASSIGNMENT OF ERROR NO. 12

By this assignment defendant contends that the trial court erred in denying his motion for a mistrial in which he argued that certain remarks made by the prosecutor during his closing argument were so prejudicial that they denied defendant a fair trial.

This assignment arose when the prosecutor stated to the jury that the evidence presented of defendant's good character could not rebut conclusive evidence of guilt of first degree murder. The prosecutor then went on to review the character testimony that defendant had presented in his defense. When he discussed the testimony of one witness who had stated that he had never heard defendant's reputation discussed, the prosecutor stated that the fact that this witness had never heard negative remarks about defendant did not constitute an affirmative statement of good reputation. In an attempt to illustrate that point he gave the following example:

> "This does not relate to this case. But, as an example, had anybody ever heard anything bad of Mr. Berkowitz, the Post Office Worker, the Son of Sam killer? No. Everybody liked him. They were surprised

that he did such a horrible thing. Remember the films? These are common sense things. You can see these things. You have seen them before. The man that killed the six children was liked by his neighbors, had a regular job. A few months ago everybody was shocked."

Defense counsel objected to the remark and moved for a mistrial. It was denied.

In brief defendant argues that the reference to the "Son of Sam" killer was an improper response to the evidence of defendant's good character and that the implied similarities between that killer and defendant inflamed the jury. Additionally he argues that the prosecutor by that statement referred to alleged facts not in the record but of which he implied that he had personal knowledge.

The scope of closing argument in Louisiana is governed by La. Code Crim. Pro. article 774 which provides:

> "The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.
>
> The argument shall not appeal to prejudice.
>
> The state's rebuttal shall be confined to answering the argument of the defendant."

Although the prosecutor's statements were comments on the probative value of

the character evidence presented by defendant and the conclusions that should be drawn from this testimony, it is questionable whether these statements fall within the permissible scope of Article 774. But even if these comments were impermissible, their use does not necessarily constitute reversible error. Before this Court will reverse a conviction on the basis of improper argument, it must be convinced that the jury was influenced by the remarks and that they contributed to the verdict. State v. Collins, 359 So. 2d 174 (La. 1978); State v. Lee, 340 So. 2d 180 (La. 1976).

In the instant case the remarks were neither detailed nor extensive. The reference was made during a clearly permissible argument concerning the value of and the weight to be given the character testimony presented by the defense. Moreover, the prosecutor preceded the illustration of his argument with the admonition that "[t]his does not relate to this case. But as an example . . . ." Nor did the prosecutor's statements express his personal belief that defendant was guilty based on facts not in evidence. The prosecutor did not imply that he knew certain facts relating to the instant case which were not in the record and which demonstrated defendant's guilt. Rather he referred only to the facts of that highly publicized case in an attempt to illustrate his argument on character evidence. And, under the circumstances we do not find that the jury was influenced by the statements and that the comments contributed to its verdict. This argument therefore does not present reversible error.

ARGUMENT NO. II
ASSIGNMENTS OF ERROR NOS. 6, 13, 14 AND 15

These assignments arose when defense counsel requested that the trial court charge the jury that it could not return a verdict of first degree murder unless the state proved beyond a reasonable doubt that a manslaughter was not committed. The trial court, although allowing defendant to include such a statement in his closing argument, refused to give the requested charge stating that the general charge included a correct statement of the law on this issue.[1]

Defendant in brief argues that the failure of the trial court to give the special instruction resulted in a shift in the burden of proof to defendant, which relieved the state of its asserted burden of proving beyond a reasonable doubt that a manslaughter was not committed. He argues that under Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), the Due Process Clause requires that the special charge be given. In that case, the U.S. Supreme Court struck down a Maine statute which was interpreted by state courts to require a defendant to establish by a preponderance of the evidence that he acted in the heat of passion in order to reduce murder to manslaughter.

Footnote 1

The trial court need not give a requested special charge if it is included within the general charge. La.Code Crim. Pro. art. 807.

Unlike the Maine statute struck down in Mullaney, Louisiana's statutory scheme for homicide does not shift the burden of proving passion to the defendant. See e.g. State v. Peterson, 290 So. 2d 307, 311 (La. 1974) in which this Court stated that "passion may be inferred by the jury from the evidence adduced upon trial by the State, there being no requirement in our law that these factors be affirmatively established by the defendant."

By refusing to give the requested special charge, the trial judge did not as defendant argues, shift the burden of proof to the defendant. The general charge contained a definition of first degree murder and its possible responsive verdicts, including manslaughter. The trial judge carefully instructed the jurors that the state had the burden to prove each essential element of the crime charged and that the presumption of innocence relieved the defendant from the necessity of any proof whatever. Additionally the trial judge correctly stated the law on reasonable doubt. We find that the trial court's refusal to give the special charge was not error. This assignment therefore lacks merit.

ARGUMENT NO. VI
ASSIGNMENT OF ERROR NO. 20

By this assignment defendant contends that the trial court erred in overruling his objection to a portion of the court's general charge to the jury. Defendant contends that by reference to a presumption that a defendant intends the natural and probable consequences of his acts, the trial court relieved the state

of its burden to prove an essential element of the crime, i.e. specific intent.

The disputed portion of the instruction was included in the trial court's general charge in regard to criminal intent. The trial judge stated: "A man is presumed to intend the natural and probable consequences of his acts." This statement was taken from R.S. 15:432 which provides:

> "A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may none the less be destroyed by rebutting evidence; such is the presumption attaching to the regularity of judicial proceedings; that the grand jury was legally constituted; that public officers have done their duty; that a relation or subject-matter once established, continues, but not that it pre-existed; that the defendant intended the natural and probable consequence of his act; that the defendant is innocent; that the defendant is sane and responsible for his actions; that the person in the unexplained possession of property recently stolen is the thief; that evidence under the control of a party and not produced by him was not produced because it would not have aided him; that the witnesses have told the truth." (Emphasis added)

To determine whether his instruction was erroneously included we must consider the judge's charge as a whole. The ruling of a trial judge on an objection

to a portion of his charge will not be disturbed unless the disputed portion when considered in connection with the remainder of the charge is shown to be erroneous and prejudicial. State v. George, 346 So. 2d 694 (La. 1977). More particularly, we have held that where a general intent charge was given in a case requiring proof of specific intent, the erroneous inclusion of that instruction was harmless error where specific intent was also charged and the full general charge fairly informed the jury of the requisite intent to be proved by the state. See State v. Anderson on rehearing, 343 So. 2d 135 (La. 1977).

The defendant in this case was charged with first degree murder which requires as an essential element the "specific intent to kill or inflict great bodily harm." The trial judge read to the jury the first degree murder statute as a part of his general charge and carefully instructed the jury relative to the state's burden in proving each essential element of the crime beyond a reasonable doubt. In addition he instructed the jury relative to specific intent, its formation, and its proof by surrounding circumstances. Because the disputed portion of the charge was general in nature and was preceded and followed by accurate instruction relative to specific intent, we can not find that the instruction taken as a whole created any confusion in the minds of the jurors as to the requirement that the state prove specific intent. This assignment lacks merit.

ARGUMENT NO. XII
ASSIGNMENT OF ERROR NO. 11

During the prosecutor's closing argument the victim's daughter who was seated in the courtroom began crying. Defense counsel moved for a mistrial and after the jury was excused explained that his motion was based on the fact that the young girl after being escorted from the courtroom cried out "Oh my daddy! Oh my daddy!" Defendant argued that because the girl had testified earlier in the trial, the jurors knew she was the victim's daughter and that her emotional outburst created an atmosphere which precluded a fair trial. The trial court denied the motion but admonished the jurors after they returned as follows:

> Ladies and gentlemen, I wish at this time to admonish you that you are to disregard any sounds, comments, or anything of any nature that you may hear inside or outside of this courtroom. You are to listen to the arguments of counsel and their recitation of what they believe the facts may have shown, their interpretation of what the law may be, and listen to my charges and then decide the case based on the facts that you find from evidence received in this trial and only received in this trial, in the form of testimony or physical evidence that was ordered admitted into evidence.

Defendant in brief contends that even if this incident did not prejudice defendant, it, combined with other assignments, prevented his having a fair trial.

Although defendant does not base his motion for a mistrial on any specific code provision, it seems to fall within La. Code Crim. Pro. article 775 which provides:

> "A mistrial may be ordered, and in a jury case the jury dismissed, when:
>
> (1) The defendant consents thereto;
>
> (2) The jury is unable to agree upon a verdict;
>
> (3) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;
>
> (4) The court finds that the defendant does not have the mental capacity to proceed;
>
> (5) It is physically impossible to proceed with the trial in conformity with law; or
>
> (6) False statements of a juror on voir dire prevent a fair trial.
>
> Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771.
>
> A mistrial shall be ordered, and in a jury case the jury dismissed,

when the state and the defendant jointly move for a mistrial."

This Court has consistently held that when conduct does not fall within the mandatory mistrial provisions of La. Code Crim. Pro. article 770, the trial judge has the discretion to determine whether the activity or comments complained of so prejudiced the defendant that he could not receive a fair trial. State v. Domangue, 350 So.2d 599 (La. 1977). In denying the motion for a mistrial, the trial judge stated that he did not observe the young girl crying and that when she did leave the courtroom only her back was visible from where the jurors sat. He further stated that although he heard the girl's cries after she left the room, there was no loud disturbance within the courtroom itself. When the jurors returned, the judge admonished them that they were to disregard any sounds that they had heard either in or out of the courtroom and that they were to decide the case only on the evidence received in the trial.

Mistrial is a drastic remedy and, except in instances in which the mistrial is mandatory, is warranted only when a trial error results in substantial prejudice to the defendant depriving him of a fair trial. State v. Overton, 337 So. 2d 1058 (La. 1976). The trial judge fully admonished the jurors that they were not to consider the incident. Further, he was satisfied that the defendant was not prejudiced by it. Therefore we can not find that the trial judge abused his discretion in denying the motion for a mistrial. This assignment lacks merit.

ARGUMENTS NOS. III, IV, V, VII, VIII, IX, X, XI, XIII, XIV [2]
ASSIGNMENTS OF ERROR NOS. 17, 18, 19, 21, 3, 4, 9, 10, 2B AND 1

We have reviewed these assignments and conclude that none present reversible error.

Decree

For the foregoing reasons the sentence and conviction of defendant are affirmed.

AFFIRMED.

X X X

Footnote 2
These assignments are as follows:

17. The court erred in overruling defendant's objection to jury instructions concerning the definition of reasonable doubt.

18. The court erred in instructing the jury on the law of self-defense.

19. The court erred in instructing the jury that intent need not be proved as a fact.

21. The court erred in instructing the jury that its decision must be unanimous.

3. The court erred in overruling defendant's motion for a mistrial

made in response to a prejudicial remark made by the court in the presence of the jurors.

4. The court erred in overruling defendant's motion for a mistrial made in response to the court's reprimanding defense counsel.

9. The court erred in overruling defendant's motion for a mistrial which complained of the cumulative effect of the prejudicial conduct of the court.

10. The court erred in overruling defendant's objection to the introduction of gruesome photographs into evidence.

2(B) The court erred in sustaining the state's challenge for cause of fifteen jurors on the grounds that they would not vote for the death penalty.

1. The court erred in overruling defendant's motion to quash the petit jury venire and in excusing numerous jurors from jury duty.

23. Not argued.

Dennis J Concurs

APPENDIX B
DENIAL OF REHEARING

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 21st day of May, 1979, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * * * *

REHEARINGS DENIED:

* * * * *

63,311 State v. Heads
DENNIS, J., would grant a rehearing.

* * * * *

APPENDIX C
NOTICE OF APPEAL FILED BELOW

IN THE SUPREME COURT OF THE
STATE OF LOUISIANA

STATE OF LOUISIANA, APPELLEE

VERSUS NUMBER 63,311

CHARLES GENE HEADS, APPELLANT

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that Charles Gene Heads, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Louisiana, affirming the judgment of conviction and denying a rehearing, entered herein on May 21, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

JACK & JACK, ATTORNEYS
1109 SLATTERY BUILDING
SHREVEPORT, LOUISIANA
71101
ATTORNEYS FOR APPELLANT

BY: s/Wellborn Jack, Jr.
WELLBORN JACK, JR.,
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 1979, copies of this notice were mailed, postage prepaid, to the

Attorney General of the State of Louisiana and to the District Attorney of Caddo Parish, Louisiana, and that all parties required to be served have been served.

s/Wellborn Jack, jr.
WELLBORN JACK, JR.

SUPREME COURT OF LOUISIANA
FILED
JUL 23 1979

FRANS J. LABRANCHE, JR.
CLERK

APPENDIX D
RELEVANT LOUISIANA STATUTES

R.S. 14:10. Criminal intent

Criminal intent may be specific or general:

(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

(2) General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

R.S. 14:29. Homicide; general provisions

Homicide is the killing of a human being by the act, procurement or culpable omission of another. Criminal homicide is of four grades:

(1) First degree murder

(2) Second degree murder

(3) Manslaughter

(4) Negligent homicide

No liability for criminal homicide shall attach unless the injured party

dies within a year after the injury is inflicted.

R.S. 14:30. First degree murder

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

R.S. 14:30.1. Second degree murder

Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years.

R.S. 14:31. Manslaughter

Manslaughter is:

(1) A homicide which would be murder

under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years.

R.S. 15:432. Effect of legal presumptions; rebutting evidence; illustrations

A legal presumption relieves him in whose favor it exists from the necessity

of any proof; but may none the less be destroyed by rebutting evidence; such is the presumption attaching to the regularity of judicial proceedings; that the grand jury was legally constituted; that public officers have done their duty; that a relation or subject-matter once established, continues, but not that it pre-existed; that the defendant intended the natural and probable consequence of his act; that the defendant is innocent; that the defendant is sane and responsible for his actions; that the person in the unexplained possession of property recently stolen is the thief; that evidence under the control of a party and not produced by him was not produced because it would not have aided him; that the witnesses have told the truth. (Emphasis added)

Code of Criminal Procedure Art. 814. Responsive verdicts; in particular

A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:

1. First Degree Murder:
   Guilty.
   Guilty of second degree murder.
   Guilty of manslaughter.
   Not guilty.

* * * * *

(All emphasis above added)